Michigan Law Review

Volume 88 | Issue 1

1989

Compensation for Constitutional Torts: Reflections on the Significance of Fault

John C. Jeffries Jr.
University of Virginia School of Law

Follow this and additional works at: https://repository.law.umich.edu/mlr

 Part of the Constitutional Law Commons, Supreme Court of the United States Commons, and the Torts Commons

Recommended Citation

John C. Jeffries Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82 (1989).
Available at: https://repository.law.umich.edu/mlr/vol88/iss1/4

This Essay is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

COMPENSATION FOR CONSTITUTIONAL TORTS: REFLECTIONS ON THE SIGNIFICANCE OF FAULT

John C. Jeffries, Jr. *

This essay is about a neglected aspect of the problem of redressing constitutional violations. Most discussions focus on incentive effects. Unconstitutional conduct can be discouraged by the "hands-on" mechanism of reform by injunction or, more commonly, through the indirection of deterrence. Deterrence issues include selection of the penalties needed to deter official misconduct; the risk that they may also inhibit legitimate government activity; the recruitment of private attorneys general to augment enforcement; and various costs of administration. These and other aspects of deterrence pervade discussions in the Supreme Court. They are also debated in a rich and sophisticated secondary literature.[1] But there is another side to the matter that has received scant attention. That issue is the role of compensation for violations of constitutional rights as a value independent of any incentive effect.

"Compensation" for violations of constitutional rights has been identified by the Supreme Court as an important goal. The term is not self-explanatory, but it suggests some nondeterrent value in the award of money damages. Even though its decisions have sharply limited the award of damages for constitutional violations, the Court continues to invoke the goal of compensation, and commentators propose reforms to make compensatory damages more available.

Both the Court and the commentators assume that compensation for violations of constitutional rights is, self-evidently, a good idea. They assume the existence of a theory of compensation — subject, of course, to competing concerns, but presumptively applicable to all injuries caused by all violations of constitutional rights. This theory is

* Emerson Spies Professor and John V. Ray Research Professor, the University of Virginia School of Law. B.A. 1970, Yale; J.D. 1973, Virginia. — Ed. I am grateful to the participants in a faculty workshop at the University of Virginia for helpful criticism of an earlier version of this essay. Special thanks are due to Kenneth Abraham, Richard Epstein, Thomas Jackson, Peter Low, Daniel Ortiz, Robert Scott, William Stuntz, and Michael Wells for detailed comments.

1. A very partial listing would include P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983); Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981); Epstein, *Private-Law Models for Official Immunity*, 42 LAW & CONTEMP. PROBS., Winter 1978, at 53; Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS., Winter 1978, at 8.

not explained, but the assumption seems to be that compensating victims is a sensible, and perhaps a sufficient, rationale for awarding damages for violations of constitutional rights.

The purpose of this essay is to examine that assumption. In my view, the goal of compensation for denials of constitutional rights is more problematic than has been supposed. Specifically, I suggest that there is no persuasive theory indifferently comprehending compensation for all injuries caused by all violations of constitutional rights. The assumption of compensation as a universal desideratum of the law governing official misconduct seems to me misguided.

Lest this argument be misunderstood, let me emphasize at the outset the limits of my claim. I am *not* making an undifferentiated broadside attack on the use of money damages to vindicate constitutional rights. Damage awards are appropriate, indeed essential, to remedy some constitutional violations. Traditionally, discussion of the damages remedy focuses on incentive effects. I agree that noninstrumental concerns should intrude on that debate, but not in the broad and undifferentiated way suggested by loose use of the term "compensation." Later in this essay, I sketch an alternative, noninstrumental rationale for awarding money damages for some constitutional violations. As the title implies, this alternative rationale is much concerned with the role of fault in constitutional violations.

I. Compensation Under Existing Law

The chief vehicles for compensating victims of government unconstitutionality are 42 U.S.C. section 1983 and the parallel common-law action based on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.*[2] Section 1983 authorizes an action for damages (or other relief) against any "person" who, acting "under color of" state law, denies any federal right.[3] *Bivens* created an analogous cause of action against federal officials.[4]

---

2. 403 U.S. 388 (1971).

3. The full text provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

4. *Bivens* itself created a damages action for fourth amendment violations. The opinion, however, did not speak narrowly to that context, and subsequent cases have taken *Bivens* to mean that a damages remedy is generally available, absent "special factors counselling hesitation." 403 U.S. at 396.

For both actions, compensation is said to be an important goal. The Court has identified compensation as a "fundamental purpose" of section 1983,[5] and has said that "the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights."[6] Similar remarks occur in many Court opinions[7] and in the comments of individual Justices.[8] And compensation is also seen as an important objective of the analogous cause of action against federal officials.[9]

Despite such statements, the precedents sharply curtail the availability of money damages. First, there is the eleventh amendment.[10] The Court has construed this provision to inhibit recovery of damages from states or state agencies.[11] "Inhibit" is used advisedly, for despite the supposedly constitutional nature of the bar, damage actions against states are permitted when Congress clearly says so.[12]

---

5. Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986) (stating that denial of compensation would "be contrary to the fundamental purpose of § 1983").

6. Carey v. Piphus, 435 U.S. 247, 254 (1978). The Court, per Justice Powell, endorsed this view by way of approving an argument against award of more than nominal damages in the absence of proof of injury. The full statement reads: "Insofar as petitioners contend that the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights, they have the better of the argument." *See also* Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986) (reiterating that nonpunitive awards must be designed to compensate for actual injuries, not simply to vindicate the abstract "importance" of a constitutional right).

7. *See, e.g.*, Felder v. Casey, 108 S. Ct. 2302, 2308 (1988) (stating that "the central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors"); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267-68 (1981) (disallowing § 1983 awards of punitive damages against municipalities on the ground that "it never has been suggested that punishment is as prominent a purpose under the statute as are compensation and deterrence"); Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980) (identifying compensation and deterrence as "two of the principle policies embodied in § 1983"); Owen v. City of Independence, 445 U.S. 622, 650-54 (1980) (emphasizing the importance under § 1983 of "the societal interest in compensating the innocent victims of governmental misconduct").

8. *See, e.g.*, Memphis Community School Dist. v. Stachura, 477 U.S. 299, 313 (1986) (Marshall, J., concurring in the judgment) (identifying compensation as "the basic purpose of a § 1983 damage award") (quoting Carey v. Piphus, 435 U.S. 247, 254 (1978)); Oklahoma City v. Tuttle, 471 U.S. 808, 842 (1985) (Stevens, J., dissenting) (citing compensation of victims as a reason for imposing *respondeat superior* liability on municipalities); Smith v. Wade, 461 U.S. 30, 93 (1983) (O'Connor, J., dissenting) (specifying compensation and deterrence as the purposes of § 1983); Robertson v. Wegmann, 436 U.S. 584, 599 (1978) (Blackmun, J., dissenting) (specifying compensation and deterrence as the "critical concerns" of § 1983).

9. *Bivens* emphasized the traditional availability of compensatory damages for personal injury. 403 U.S. at 395-97; *see also* 403 U.S. at 408 (Harlan, J., concurring in the judgment); Carlson v. Green, 446 U.S. 14, 21 (1980); Carey v. Piphus, 435 U.S. 247, 254-55 (1978).

10. The amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

11. *See* Edelman v. Jordan, 415 U.S. 651 (1974).

12. *See* Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

Section 1983 could have been read as such a clear statement,[13] but the Court has refused to do so.[14] The result is that damages actions for constitutional violations will not lie against states or against state officers sued in an official capacity. The only recourse is to sue a state officer for individual misconduct.

It is true, of course, that states routinely indemnify their employees against such liability, but the identity of the defendant may well matter. The requirement that suit be brought against an individual official means that plaintiffs cannot sue a "deep pocket." Juries may be more sympathetic to the plight of individual officials than to the governments they represent.[15] And the bar against suing governments directly may make it especially difficult to pursue claims of institutional malfunction or collapse. The focus on individual responsibility tends to divert attention from problems of government structure and organization, as distinct from the specific acts of individual officials.[16]

More important, all government officials (whether state or federal)[17] can claim some sort of immunity against an award of damages. Sometimes the immunity is absolute, and the sacrifice of competing interests is correspondingly complete.[18] More commonly, officials can invoke a qualified immunity defense. Originally framed in the context of false arrest, the qualified immunity was said to arise if the defendant police officers could show "good faith and probable cause" for their actions.[19] As extended to other contexts, the formulations of qualified

13. The case for doing so was first made by Justice Brennan in Quern v. Jordan, 440 U.S. 332, 354-65 (1979) (Brennan, J., concurring in the judgment).

14. Will v. Michigan Dept. of State Police, 109 S. Ct. 2304 (1989); *Quern*, 440 U.S. at 338-45; *Edelman*, 415 U.S. at 676-77.

15. This potential is illustrated in cases involving municipal liability. In that context, plaintiffs ordinarily sue both individual officials and the governments that employ them. The results are sometimes very disparate. See, for example, Oklahoma City v. Tuttle, 471 U.S. 808 (1985), where a jury returned a verdict in favor of a rookie police officer who had shot and killed a man quite unnecessarily, but assessed damages against the municipality in the amount of $1.5 million.

16. For an argument to this effect, see Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 259 (1986).

17. The immunities available to state and federal officials are generally the same. *See* Butz v. Economou, 438 U.S. 478, 504 (1978) (concluding that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials"). The major exception is the President, who enjoys an absolute damages immunity that has no parallel among state executive officers. *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982).

18. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 430 (1976) (absolute immunity for prosecutorial conduct "intimately associated with the judicial phase of the criminal process"); Pierson v. Ray, 386 U.S. 547 (1967) (absolute immunity for judicial acts); Tenney v. Brandhove, 341 U.S. 367 (1951) (absolute immunity for legislative acts).

19. *Pierson*, 386 U.S. at 557.

immunity became progressively more variegated and abstract,[20] but retained until lately the conjunction of subjective and objective elements. Recently, however, the Court has become concerned that the issue of a defendant's subjective "good faith" invites unnecessarily wide-ranging discovery and frustrates the appropriate use of summary judgment. The Court's response has been to de-emphasize the subjective branch of the inquiry and to focus instead on the objective reasonableness of the defendant's conduct.[21] Under the latest precedents, it seems likely that summary judgment will be granted, in advance of discovery, where the defendant can show that a reasonable official in his or her situation could have believed the conduct lawful.[22] In any event, it is plain that the defense of qualified immunity precludes compensation for many unconstitutional acts. Only in extreme or flagrant cases will damages likely be paid.

In one context only is compensation the controlling value. Despite its usual willingness to subordinate compensation to other concerns, the Supreme Court has moved aggressively to compensate persons injured by an official "policy or custom" of local government. *Monell v. Department of Social Services*[23] held that a city, unlike a state, is a "person" within the meaning of section 1983.[24] *Owen v. City of Inde-*

---

20. The most comprehensive statement of qualified immunity comes from Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974):

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

21. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

22. *See* Anderson v. Creighton, 483 U.S. 635 (1987). At least this is true where the plaintiff makes only a broad and unsubstantiated allegation of bad faith. Whether the same rule would apply where the plaintiff is able to present plausible and concrete allegations of bad faith is open to question. My own guess is that the Supreme Court does not desire to eliminate altogether the subjective branch of the qualified immunity inquiry, but only to discipline the process of discovery. Where the claimant makes concrete and detailed allegations fairly suggestive of official bad faith, I would expect those allegations to be heard.

23. 436 U.S. 658 (1978).

24. Nothing will be said here about the "reasoning" of *Monell,* as the opinion is concerned chiefly with the legislative history of the Civil Rights Act of 1871. Anyone who spends time with the Court's investigations of that history will find them at least opportunistic. *Monell* is a particularly rich example. First, it reversed the Court's earlier and unanimous conclusion, based equally on the history of the 1871 Act, that "person" did not include municipality. *See* Monroe v. Pape, 365 U.S. 167, 187-92 (1961). Second, the *Monell* Court found in that same history a requirement, for municipal liability, of an official "policy or custom" supporting the unconstitutional act. This is the same sort of showing that the *Monroe* Court, over Justice Frankfurter's dissent, refused to require for any other "person" who might be sued under § 1983. Thus, we are told that the 42d Congress simultaneously intended to require proof of an official policy or custom in order to hold a municipality liable as a "person" acting "under color of any statute, ordinance, regulation, custom or usage" of state law (R.S. § 1979, 42 U.S.C. § 1983), but to

pendence[25] added that a city, unlike every other "person," potentially liable under the statute, has no immunity against the award of damages. As Justice Powell complained in dissent, "municipalities . . . have gone in two short years from absolute immunity under § 1983 to strict liability."[26] Of course, this rule is restricted by the requirement of an official "policy or custom," a requirement that seems to turn on whether the offending action was taken by someone with authority to make official policy with respect to that issue.[27] Where that showing can be made, injured persons can recover money damages without regard to the reasonableness of the government's conduct or the plausibility of a belief in its legality.

The remarkable thing about *Owen* is its discontinuity with other cases. The early immunity decisions paid little attention to policy concerns one way or the other; they were preoccupied with the inferences that might be drawn from the (lack of) discussion of the immunity issue in 1871.[28] More recently, the Court has referred to "two mutually dependent rationales" for official immunity:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness

---

dispense with this requirement for any other kind of "person" sued under the same provision. As a matter of policy, these positions may not be inevitably incompatible, but they are not a persuasive reading of the historical record adduced in the Court's opinions. For a similar complaint regarding the Court's historical treatment of immunity issues, see Matasar, *Personal Immunities under Section 1983: The Limits of the Court's Historical Analysis,* 40 ARK. L. REV. 741 (1987).

25. 445 U.S. 622 (1980).

26. 445 U.S. at 665 (Powell, J., dissenting).

27. *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986) (holding that municipal liability may be imposed for a single decision by a municipal official, but only where that official has "final authority to establish municipal policy with respect to the action ordered"); Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (holding that a municipal "policy" of inadequate training cannot be inferred from a single instance of police misconduct). For academic investigation of where to draw the line, see Brown, *Municipal Liability under Section 1983 and the Ambiguities of Burger Court Federalism: A Comment on* City of Oklahoma City v. Tuttle *and* Pembaur v. City of Cincinnati — *the "Official Policy" Cases,* 27 B.C. L. REV. 883 (1986); Gerhardt, *The* Monell *Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983,* 62 S. CAL. L. REV. 539 (1989); and Snyder, *The Final Authority Analysis: A Unified Approach to Municipal Liability Under Section 1983,* 1986 WIS. L. REV. 633. The necessity of making the distinction is attacked in Mead, *42 U.S.C. § 1983 Municipal Liability: The* Monell *Sketch Becomes a Distorted Picture,* 65 N.C. L. REV. 517 (1987), which urges that municipalities be held liable for the acts of employees on a theory of *respondeat superior,* and in Kramer & Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis,* 1987 SUP. CT. REV. 249, which concludes that either a comprehensive negligence requirement or conventional *respondeat superior* would be preferable to the requirement of official "policy or custom."

28. *See, e.g.,* Pierson v. Ray, 386 U.S. 547, 554 (1967) (examining official immunity at common law and finding in legislative silence "no clear indication that Congress meant to abolish wholesale all common-law immunities").

and judgment required by the public good.[29]

Obviously, these concerns were invoked to limit the award of damages. In *Owen,* however, the Court (in addition to the usual historical exertions) discovered the importance of compensation:

> A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees . . . . Yet owing to the qualified immunity enjoyed by most government officials, see *Scheuer v. Rhodes,* 416 U.S. 232 (1974), many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense.[30]

This is true. Many persons injured by municipal unconstitutionality would be left remediless if cities were allowed a good-faith defense. And that is precisely the situation in which most persons harmed by state or federal unconstitutionality currently find themselves. Grounds for distinguishing among these cases were nowhere specified.[31]

Owen is also notable for its selective reliance on modern tort principles. The Court noted that many victims of municipal unconstitutionality would be left remediless if cities were allowed to claim

---

29. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974); *see also* Owen v. City of Independence, 445 U.S. 622, 654 (1980); Butz v. Economou, 438 U.S. 478, 506-07 (1978).

30. 445 U.S. at 651.

31. The suggestion has been made that the disparity is explained by the eleventh amendment. That provision casts whatever protection it may be thought to provide over states and state agencies, but not over units of local government. *See* Lincoln County v. Luning, 133 U.S. 529 (1890). Thus, for those who accept the broad outlines of current eleventh amendment doctrine, it is plausible to assert that the different treatment accorded victims of state and municipal constitutional violations, although unintelligible as a matter of policy, follows from history and precedent.

The trouble is that this explanation isolates one small fragment of eleventh amendment precedent. Elsewhere the cases afford ample opportunity for reconciling state and municipal liability. This could be done simply by reading the word "person" in § 1983 to exclude cities as well as states or to include states as well as cities. Either interpretation fits the statutory language tolerably well, and neither does more violence to history than readers of Supreme Court opinions have come to expect. *Cf.* Will v. Michigan Dept. of State Police, 109 S. Ct. 2304 (1989).

Alternatively, the Court could retain the current bifurcated reading of "person" and simply withdraw from all such "persons" the defense of qualified immunity. As a practical matter, governments at all levels find it necessary to indemnify their employees against liability incurred in the course of employment. In many jurisdictions, this is required by statute. *See, e.g.,* CAL. GOVT. CODE § 825 (1982); ILL. ANN. STAT. ch. 24, § 1-4-5 (Smith-Hurd 1962 & Supp. 1989); ILL. ANN. STAT. ch. 85, § 2-301 (Smith-Hurd 1987); MICH. COMP. LAWS ANN. § 691.1408 (West 1987); N.J. STAT. ANN. § 59:10-4 (West 1982 & Supp. 1989); N.Y. PUB. OFF. LAW § 18 (McKinney 1988 & Supp. 1989). In other jurisdictions, the same result is accomplished without statutory command. *See generally* Project, *Suing the Police in Federal Court,* 88 YALE L.J. 781 (1979). If government officials were denied the immunity defense, the practical effect would be to hold their employing governments to the same standard of liability. And if, as has been true in the past, the liability of federal officers sued under *Bivens* were aligned with the law of § 1983, the result would be a comprehensive regime of no immunity for government at all levels.

Whether this would be sound policy is not the issue here. My point is only that a consistent policy one way or the other is well within the demonstrated range of judicial creativity. The Court is not disabled from making sense.

qualified immunity, then added: "Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated."[32] Evidently, noncompensation is unjust whenever loss is caused by unconstitutional conduct, without regard to the kind of fault identified by the law of qualified immunity.[33] In other words, the argument assumes that "justice" requires the award of money damages whenever unconstitutional conduct causes injury to another. As the Court phrased it: "Elemental notions of fairness dictate that one who causes a loss should bear the loss."[34]

Now, this conception is familiar to tort scholars in proposals of no-fault liability,[35] and perhaps it is nearly descriptive of pockets of American tort law. But as a general proposition, the claim that compensation should inevitably follow causation — the notion that all uncompensated loss is unjust — is anything but "elemental." And it is certainly not descriptive of any familiar principle of *governmental* tort liability. One need only say the words "just compensation" to be reminded of the extent to which mere loss-causing has been found inadequate to require government compensation. Thus, *Owen* not only makes a sharp break with earlier section 1983 cases, it also adopts for violations of constitutional rights an unusual conception of the appropriate basis for tort liability generally.

Of course, to say that a position is new and controversial is not to prove it wrong. In fact, the innovation in *Owen* has important academic support.[36] In my view, however, *Owen* is wrong, and not for any trivial reason. The essential problem is the unsound assumption that compensation for all losses caused by all violations of constitutional rights is a sensible goal of section 1983. I am not arguing merely that the goal of compensation may be outweighed by competing concerns. Everyone agrees with that. My claim is more ambitious and surely more controversial. It is that compensation for losses

32. 445 U.S. at 651.

33. This awkward phrasing is required because, for some rights, fault of a kind may be necessary to make out a constitutional violation. More will be said later about the particular concept of fault that underlies the defense of qualified immunity and that the *Owen* Court found unnecessary in the case of municipal liability.

34. 445 U.S. at 654.

35. *See, e.g.*, Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CALIF. L. REV. 677 (1985).

36. *See, e.g.*, P. SCHUCK, *supra* note 1, at 101; Mead, *supra* note 27 (arguing for municipal liability without fault and without regard to the "policy or custom" limitation of *Monell*); *cf.* Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175 (1977) (impliedly endorsing this position by arguing for governmental liability in situations where individual officers would not be liable).

caused by constitutional violations is not a uniformly sensible aspiration. The next section of this essay examines why that might be so.

II. RATIONALES FOR COMPENSATION

Why — apart from incentive effects — should violations of constitutional rights be compensable in money damages? What kinds of reasons, other than deterrence, might be advanced to support such payments?

A. *Affirmation of Rights*

Perhaps the most obvious reason is simple affirmation of rights. A right without a remedy is, if not meaningless, at least incomplete. But the desirability of *some* remedy does not prove the desirability of any particular remedy. Possible remedies include criminal prosecution, declaratory or injunctive relief, administrative discipline, and civil fines, as well as compensatory damages. The argument for affirmation of rights does not speak to the choice among them.

B. *Distributive Justice*

Less readily dismissed is the idea that compensation for violations of constitutional rights is somehow justified by a concern for distributive justice.[37] The origins of this intuition are understandable. Denial of a constitutional right ordinarily causes injury. The victim is worse off than before, perhaps greatly so. If the government is viewed, as it tends to be, as the ultimate "deep pocket," a wealth transfer to the injured person may seem distributively sound. The plausibility of this assumption is likely enhanced by the historic (but increasingly attenuated) association of section 1983 with the protection of society's least fortunate.

Of course, none of this survives reflection. Simply put, there is no reason to suppose that persons harmed by unconstitutional acts are especially deserving beneficiaries of redistribution of wealth. To be sure, any injured person presents a sympathetic case for wealth transfer. An injured individual has suffered loss, and losses ideally should be prevented or offset. In the real world, however, even devastating losses routinely go unredressed. The loss of a job, injury to one's sight, infection with AIDS — these are not in themselves compensable events. Nor do they necessarily lead to anything more than minimally

37. Note that this discussion deals only with strictly distributive concerns. To some, the phrase "distributive justice" may evoke the idea of "corrective justice," which is considered separately below.

adequate public welfare. To a significant degree, those losses lie where they fall. But, one might say, surely there is a difference between losses caused by human agency and so-called "acts of God." Indeed there is, but the difference lies precisely in the relevance of nondistributive rationales for awarding damages. Insofar as the focus is on distributive justice, it is hard to see why the person harmed by unconstitutional conduct should move to the head of the line.

The same is true if one considers only those losses caused by government. Governments cause many harms. Some result from unconstitutional conduct; others from lawful action. From a distributive point of view, the difference is immaterial. Neither the severity of the injury nor the degree of resulting hardship depends on the legality of the government's act. Lawful government action may cause devastating harm, while even flagrant unconstitutionality may injure only slightly. If money is collected from all members of society to compensate those injured by unconstitutional government acts, some persons gravely harmed by (lawful) government action will be made to join in compensating minor (unlawful) injuries to economically advantaged individuals. As a scheme for redistributing wealth, or merely for relieving hardship, this makes little sense.

An example will show how indistinguishable lawful and unlawful injury may be. Consider a case of search and seizure. The police come to a home. They wake the occupants, herd them outside, and hold them there while their house and its contents are exhaustively searched. At the least, this sort of intrusion is an inconvenience. At the most, it may cause anxiety and distress, public embarrassment and humiliation, loss of standing in the community, even physical damage. None of these harms depends on the lawfulness of the search. Neither do they flow from the victim's own wrongdoing.[38] Viewed simply as an occasion for shifting wealth to offset loss, the severity of injury and degree of resulting hardship should control. The legality of the government's conduct is merely incidental.

Because unconstitutional acts are thought of as especially bad, the impression sometimes persists that unconstitutionality is a reliable proxy for severity of harm. It is important to recognize that this is not true. Consider the case of a person wrongly (that is, inaccurately) convicted of crime. The person is sentenced to prison and is confined several years before exculpatory evidence comes to light. Predictable

38. The legality of the search is not dependably related to misconduct by the victim. Even where the person harmed by the intrusion and the target of the search are the same, the relationship is only probabilistic. Moreover, some persons not even suspected of wrongdoing will be injured as well.

harms include loss of economic and social standing, disruption of family relationships, and the risks and degradations of confinement. In causing these harms, the government and all of its agents may have behaved entirely properly. There may have been no misconduct, much less illegality, on anyone's part. Yet an innocent individual has suffered, and suffered grievously, at the hands of the government. There can be no more poignant case for financial restitution from society at large, yet no unconstitutionality has occurred.

I conclude, therefore, that compensation for constitutional violations cannot be justified on grounds of distributive justice. The beneficiaries of such a program would not be dependably worse off than their fellow citizens; neither would they necessarily have suffered greater harm. As a class, they would not be more deserving of aid than other members of society. One might think that the charitable impulse would more sensibly be aimed at all who suffer special hardship, without regard to cause or origin. But whatever the right criteria for redistributing wealth, the mere fact that injury is caused by government unconstitutionality is not, in itself, a suitable test.

C. *Loss Spreading*

Another possible reason for compensation is loss spreading. The term is sometimes used to evoke distributive concerns. Apart from that, "loss spreading" suggests an argument based on the diminishing marginal utility of money.[39] If the diminishing marginal utility of money were comparable across individuals, then spreading a given loss over many persons would diminish its total impact. In Benthamite terminology, the assumption is that 10,000 persons who lose one dollar each will feel in the aggregate less pain than one person who loses $10,000. Of course, the accuracy of this assumption can be debated,[40] but the objections to loss spreading as a reason to compensate for constitutional violations go beyond the general problem of interpersonal comparisons of utility. Even if one accepts the general validity of such comparisons, important difficulties remain.

For one thing, loss spreading as a rationale for compensation is most plausible where transaction costs are small. Where they are large, the total loss to be distributed will be significantly increased by the costs of administration. The additional loss will swamp any decrease in aggregate pain achieved by spreading. This objection is espe-

39. *See generally* G. CALABRESI, THE COSTS OF ACCIDENTS 39-41 (1970).

40. *See, e.g.*, Blum & Kalven, *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952).

cially telling in the present context. The costs of adjudicating damages claims under section 1983 and the analogous *Bivens*-type remedies are anything but minimal, and it is hard to believe that they can be offset by utility gains from loss spreading.

More fundamentally, loss spreading raises questions similar to those considered in connection with distributive justice. Why spread only losses caused by constitutional violations? Why not spread all losses, or at least all losses caused by government? Even if one accepts the (admittedly unprovable) premise that loss spreading decreases total pain, and even if one discounts the (probably decisive) impact of transaction costs, it is still not clear how loss spreading justifies compensation for some losses but not others. Simply put, there is no obvious link between the general rationale of loss spreading and the specific issue of compensation for injuries resulting from constitutional violations. Whatever force loss spreading may be thought to have (or lack) as a general matter, that rationale does not target losses caused by unconstitutional government conduct for a special regime. Compensation as a goal of the specific regime of section 1983 and *Bivens*-type actions is not explained on this ground.

D. *Corrective Justice*

To my mind, the most persuasive nondeterrence justification for awarding tort damages to victims of government unconstitutionality lies in the idea of "corrective justice." The concept comes from Aristotle,[41] who saw in the relationship of wrongdoer to victim a basis for awarding damages without regard to relative wealth or virtue. "Corrective justice" has reappeared in the debates of modern tort theorists, not always to the same effect.[42] The version sketched here is adapted from Ernest J. Weinrib, whose article *Causation and Wrongdoing* is the basis for much of the following.[43]

"Corrective justice" is a noninstrumental conception of tort liability. In this view, tort law does not simply work out the interplay among various external functions that damages might be thought to

41. ARISTOTLE, NICOMACHEAN ETHICS *1130a-*1132b.

42. *See, e.g.*, Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982); Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979); Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981).

43. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987). Weinrib's article addresses tort theory generally. As is likely all too clear, I am not a tort scholar, and I do not feel competent to express an opinion on the general success of his position. In the specific (and special) context of government torts, Weinrib's reasoning seems to me informative. These remarks address only that context.

serve.[44] Rather, it expresses a single normative conception integrating defendant's wrongdoing and plaintiff's injury. The premise is Kantian. Persons are ends in themselves; they cannot be expropriated for another's purpose. Therefore, relations among persons are subject to the concept of right. "Right" refers to "the totality of conditions under which the actions of one can be united with the freedom of others in accordance with a universal law."[45] Interaction among free and equal moral persons must observe these conditions.

The analogy to constitutionalism is apparent. Persons must be treated as ends in themselves, not merely as objects or instruments of government policy. They cannot simply be used for the common good. Therefore, relations between the government and individuals are subject to the concept of right. The rights recognized under the Constitution state conditions under which the actions of the government can be united with the freedom of the individual. Respecting the rights of individuals requires limitations on the use of government power, and these are captured in the familiar prohibitions of constitutional law.

In this conception, government wrongdoing that causes individual injury should be redressed by the award of damages, without regard to the antecedent (or resulting) distribution of wealth. The government has achieved a wrongful gain (some more effective or less costly implementation of government policy) by inflicting a wrongful loss. The award of damages from government to victim at once annuls the wrongful gain and rectifies the wrongful loss. The payment from wrongdoer to victim retraces the moral relationship between them. To the extent possible, it undoes the wrong. The point is not merely that the loss is offset (as a loss in one stock might be offset by a gain in another), but that the loss is *rectified* by damages from the wrongdoer. And government funding is required, not simply because a loss occurred (as might be implied by a concern for distributive justice), but because it was caused by government wrongdoing. This restorative transfer from wrongdoer to victim is intelligible as corrective justice, without regard to distributive effect.

Both causation and wrongdoing are essential to this conception. Causation links victim to wrongdoer. It particularizes the relation between them by showing why *this plaintiff* is entitled to recover.[46] De-

44. *Cf.* Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975).

45. Weinrib, *supra* note 43, at 449 (citing I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 34 (J. Ladd trans. 1965)).

46. *See* Weinrib, *supra* note 43, at 411-16. Weinrib makes this argument as an amendment to

fendant's wrongdoing may risk harm to many persons. Not everyone endangered by wrongdoing, however, may demand damages. Causation singles out a particular plaintiff — one who has been injured by the defendant's act — to make a claim on the defendant's resources. Without causation, plaintiff's connection to defendant is undifferentiated and vastly overinclusive.

Wrongdoing is also required. Just as causation identifies why this plaintiff is entitled to recover, fault identifies why *this defendant* is obliged to pay. Causation itself is inadequate to this task, for there are, in the nature of things, many causes of any injury. The plaintiff's own conduct, for example, is usually, if not always, a but-for cause of plaintiff's injury. Other causal antecedents abound, and there is nothing inherent in the concept of causation (as distinct from external limitations imposed in the name of causation) to say which causes count. The showing of fault fills this gap. It identifies the causal antecedent that will be regarded as legally significant. It singles out a particular defendant — one whose *wrongful* act has caused the plaintiff's injury — to make good the plaintiff's loss.[47]

More simply, fault supplies the moral dimension to the causal relationship. While causation traces a physical connection between doer and sufferer, it provides in itself no moral basis for coercing compensation. It supplies no ground for taking this defendant's assets to make good the plaintiff's loss. As Weinrib says, "an injury that is not the materialization of a wrong is a misfortune devoid of normative significance for its author."[48] The loss may or may not be shifted on distributive grounds, but the mere fact of causation is not an intelligible basis for wealth transfer without regard to distributive effect.

In summary, both causation and fault are essential to corrective

---

the causation theory of Judith Jarvis Thompson. *See* Thompson, *Remarks on Causation and Liability,* 13 PHIL. & PUB. AFF. 101 (1984).

47. Weinrib summarizes this argument as follows:

> [C]ausation particularizes by singling out this plaintiff from the class of persons whom the defendant has endangered. Through injury the general risk which the wrongdoing has unreasonably created lodges in a particular person. Similarly, wrongdoing serves to single out from among the numerous causal antecedents of the plaintiff's injury the particular cause that is juridically significant. Causation particularizes the plaintiff against the background of the defendant's wrongful risk creation, and wrongdoing particularizes the defendant against the background of the totality of the injury's causes. In this way causation and wrongdoing each reciprocally particularize with respect to the other.

Weinrib, *supra* note 43, at 429-30. Weinrib's discussion is part of an extended criticism of the views of Richard Epstein. *Id.* at 416-28. For Epstein's views, see Epstein, *Intentional Harms,* 4 J. LEGAL STUD. 391 (1975); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability,* 3 J. LEGAL STUD. 165 (1974); Epstein, *A Theory of Strict Liability,* 2 J. LEGAL STUD. 151 (1973).

48. Weinrib, *supra* note 43, at 430; *see also* Posner, *supra* note 42 (criticizing theories of corrective justice that dispense with the requirement of wrongdoing as a mischaracterization of Aristotle).

justice. Together, they make a normatively significant connection between wrongdoer and victim. The defendant's wrongful act has caused the plaintiff's loss; defendant's payment to plaintiff of a sum quantifying that loss annuls the wrong done and rectifies the plaintiff's injury. Corrective justice thus provides an intelligible basis, apart from deterrence, for redressing specific constitutional violations through the award of damages. It provides the most persuasive understanding of what "compensation," as a value distinct from incentive effect, might sensibly mean.

III. THE SIGNIFICANCE OF FAULT

The shift from "compensation" to "corrective justice" focuses attention on the role of fault[49] in cases of government unconstitutionality. At one level, this subject is forbiddingly complex, as it encompasses the entire range of culpability structures of constitutional rights. These requirements are built into the definition of the rights themselves, and they vary greatly. Analytically, these requirements are unrelated to the remedial structure of section 1983 and *Bivens*-type actions. Those remedies independently require proof of negligence as to illegality. This, at least, is a plausible summary of the law of qualified immunity. Disentangling these two strands makes the concept of fault in constitutional violations more accessible than it at first appears.

First, there is the culpability structure of the underlying right. Although the terminology of the criminal law is rarely used here, many constitutional rights are defined in such a way that their violation requires something analogous to specific intent. An example is the guarantee against racial discrimination. A violation of the equal protection clause is made out only where there is racially discriminatory motivation. Racially disparate impact is not in itself unconstitutional.[50] Another example comes from the line of cases from *Parratt v. Taylor*[51] through *Daniels v. Williams.*[52] The Supreme Court ultimately concluded in these cases that the "deprivation" of life, liberty, or property prohibited by the due process clause requires an intent to deprive. Mere negligence in causing injury to life, liberty, or property

49. As this discussion makes clear, I am using "fault" and "wrongdoing" in the conventional legal sense as culpability, including culpable inadvertence, as in the violation of a legal norm of which the actor should have been aware.

50. *See, e.g.*, Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). For interesting criticism of this requirement, see Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989).

51. 451 U.S. 527 (1981).

52. 474 U.S. 327 (1986).

does not implicate due process concerns. Other examples can be found throughout constitutional law, where the motivation underlying government action often determines its constitutionality.[53]

Other violations of constitutional rights do not require any particular culpability. A search conducted under an invalid warrant violates the fourth amendment, even if all government officials acted reasonably and in good faith.[54] Enforcement of an excessively vague criminal statute is unconstitutional, even if the arresting officers have acted entirely in good faith.[55] And a court in deciding what process is due for (an intentional) deprivation of property will not be concerned with whether the relevant government official might reasonably have thought some lesser standard sufficient.[56] In these and in many other cases, unconstitutionality may be shown without regard to state of mind.

In short, culpability requirements vary from right to right. They derive from the definitions of the rights themselves and are logically antecedent to the remedial structure of section 1983. That remedy imposes its own culpability requirement through the law of qualified immunity. While the defense of qualified immunity very likely applies to all official action (except where the immunity is absolute), it is often made irrelevant by the culpability structure of the underlying right.

---

53. *See, e.g.*, Walz v. Tax Commn., 397 U.S. 664 (1970) (requiring that laws challenged as an establishment of religion have a secular purpose); United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding constitutional protection for symbolic speech dependent in part on whether the governmental interest in regulating such conduct "is unrelated to the suppression of free expression").

54. The fact that the fourth amendment protects against "unreasonable" searches and seizures might be taken to suggest that any fourth amendment violation is by definition unreasonable. *Cf.* Anderson v. Creighton, 483 U.S. 635, 647-68 (1987) (Stevens, J., dissenting). To the extent that the fourth amendment guarantee remains an unstructured inquiry into reasonableness, that might be true. See Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 for a Police Officer's Use of Excessive Force,* 62 TEMPLE L. REV. 61 (1989). But to the extent that the fourth amendment protection has been cast into prophylactic rules — most notably the warrant requirement — that is not the case. As the case law has actually developed, it is perfectly possible to be reasonably mistaken about the requirements of fourth amendment reasonableness. *See, e.g.*, Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) (holding a search unconstitutional where law enforcement officers following local precedent failed to anticipate the rule of Steagald v. United States, 451 U.S. 204 (1981), which held that an arrest warrant does not justify search of a third party's home where the target of the arrest warrant is reasonably thought to be).

55. *Cf.* Powell v. Stone, 507 F.2d 93 (9th Cir. 1974) (one of the cases considered in Stone v. Powell, 428 U.S. 465 (1976), where the Supreme Court constricted the scope of federal habeas review of fourth amendment claims).

56. This last example confirms that some constitutional rights are mixtures of what a criminal lawyer would call subjective and objective standards. The establishment clause is another example. A law may violate that provision if it has the impermissible purpose of aiding religion *or* if that is its primary effect *or* if the law leads to excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602 (1971). Effect may be a proxy for purpose, but entanglement is an independent and wholly objective ground of unconstitutionality.

Generally speaking, where the underlying constitutional right requires illicit motivation, no further inquiry will be necessary or useful. A government officer shown to have acted with racial animus will not be heard to say that he or she did not know such action to be unlawful. That claim would be legally irrelevant, factually incredible, or both.[57] Thus, as a practical matter, the state of mind required by a particular constitutional right may obviate any concern for the analytically distinct kind of culpability required by the law of qualified immunity.

Where the underlying right does not require illicit motivation, attention shifts to the law of qualified immunity. Technically, section 1983 does not require culpability. That is to say, the cause of action for money damages under section 1983 does not require proof of any state of mind apart from that which may be required by the definition of the underlying right.[58] But state of mind matters nonetheless. It comes into play via the defense of qualified immunity. The law of qualified immunity varies appreciably with context, but the general theme is the defendant's reasonable belief in the legality of the conduct.[59] This issue is particularly likely to arise at the margins of constitutional law and where the underlying right does not require illicit motivation. In such cases, it may happen that a government officer reasonably believes in the lawfulness of action that the courts subsequently disapprove. The law of qualified immunity precludes damages liability in such cases.

Obviously, a great deal more can be said about the law of qualified

57. Most likely it is legally irrelevant because it is factually incredible. This, I think, is much of the reason for the evolution of the criminal law doctrine that ignorance of the law is no excuse. In an age where criminality was confined to heinous wrongs, a claim of nonculpable ignorance of the law would be factually incredible and hence legally irrelevant.

58. For many years this was uncertain, and there was a debate in the literature over whether liability under § 1983 could be based on simple negligence. *See* Gildin, *The Standard of Culpability in Section 1983 and* Bivens *Actions: The Prima Facie Case, Qualified Immunity and the Constitution,* 11 HOFSTRA L. REV. 557 (1983) (analyzing the various sources of a fault requirement in civil rights actions); Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State-of-Mind Requirement,* 46 U. CINN. L. REV. 45 (1977) (reviewing the history of the question and suggesting that the standard under § 1983 should vary with the right being asserted). After several false starts, the Supreme Court concluded, as is surely correct, that the cause of action created by § 1983 requires no state of mind additional to that, if any, required by the underlying right. *See* Daniels v. Williams, 474 U.S. 327, 328 (1986) (construing Parratt v. Taylor, 451 U.S. 527 (1981), as having decided "that § 1983 contains no independent state-of-mind requirement").

59. *See, e.g.,* Pierson v. Ray, 386 U.S. 547 (1967) (holding that police officers sued for unconstitutional arrest of civil rights demonstrators were entitled to a defense of "good faith and probable cause"); Wood v. Strickland, 420 U.S. 308 (1975) (holding that the liability of a school board member depended in part on whether "he knew or reasonably should have known that the action . . . would violate the constitutional rights of the student affected"); Anderson v. Creighton, 483 U.S. 635 (1987) (holding that a federal agent sued for conducting an unlawful search was entitled to summary judgment if the actions alleged were actions "that a reasonable officer could have believed . . . lawful").

immunity. Much of it is controversial, and some of it puzzling.[60] Fortunately, my purpose does not require full explication of this subject; still less does it depend on agreement with the particulars of existing law. My point is only to indicate by reference the kinds of inquiry that the courts have found necessary to determine fault in constitutional violations. I do not wish to burden this essay with a lengthy attempt to describe the understandings that traditionally have prevailed in this field, but I do wish to suggest that some such inquiry is a necessary part of the idea of corrective justice as applied to constitutional violations.

Of course, there is another view. One might say, as *Owen* implies, that corrective justice requires restorative transfers for *all* violations of constitutional rights, without regard to fault.[61] One might believe that *any* violation of the Constitution is an act of wrongdoing, that fault is inherent in unconstitutionality. On this view, the reasonableness of an official's conduct is irrelevant, and every constitutional violation, re-

60. In particular, one might wonder why the idea of fault in constitutional violations (as refracted through the law of qualified immunity) requires culpable inadvertence to illegality. By contrast, the criminal law is dominated, at least formally, by the maxim that "ignorance of the law is no excuse." The difference, I think, lies in the nature of the prohibitions. Where the conduct is wrongful in itself (as in traditional crimes and in constitutional violations requiring illicit motivation), there will be no concern about culpability with respect to illegality. Where, by contrast, the conduct is wrong only because forbidden (as in so-called regulatory offenses and in constitutional rights framed prophylactically), fault requires at least culpable inadvertence to the terms of the prohibition. For constitutional violations, that proposition is well established by the law of qualified immunity. For criminal offenses, there has been a little movement in that direction, *see, e.g.*, N.J. STAT. ANN. § 2C:2-4(c)(3) (West 1982), but in general the enforcement of regulatory offenses continues in uneasy reliance on prosecutorial discretion to weed out cases of genuinely reasonable mistake.

61. This view may be derived from the work of Richard Epstein, *see supra* note 47, and it has been cogently argued to me privately by Epstein and by Michael Wells. I do not wish to undertake a detailed response to their views based only on my summary of them, but it may be helpful to locate one key point of disagreement. In their letters to me, both Epstein and Wells offered property hypotheticals to dispute Weinrib's emphasis on fault, either across the board or more particularly for government torts. As Epstein said: "[T]o take the easiest case imaginable, suppose that the defendant has by innocent mistake taken the plaintiff's property and kept it on his own property. The suit demanding the return of the property is: Give me back my property which you took." Epstein concludes that this suit could not be defeated on the ground that the defendant lacked fault: "He has what the plaintiff owns, and the theory of redress demands that the status quo ante be restored."

I agree. But it seems to me that a very different case is put where the problem is not misappropriation of property, but compensation for personal injury. Where loss has occurred, the status quo ante cannot be restored. Someone must bear the loss, and it is very difficult for me to think about who that someone should be without bringing in notions of fault. This may be done directly, as Weinrib would have it, or through various defenses to strict liability, as (in my understanding) Epstein would prefer. No doubt there are important differences in these approaches, but I do not think they greatly affect the validity of the analogy I am attempting to draw. At its simplest, the dispute may be whether constitutional violations are more akin to takings of property rights or to tortious personal injuries. I find the latter more plausible.

Of course, both Epstein and Wells have a great deal more to say on this subject. I can only say that I hope they will have occasion to state publicly the interesting and thoughtful criticisms which they have generously shared with me.

gardless of circumstance, is presumptively appropriate for rectification by money damages.

I cannot prove this intuition error, but I can say a few words about why I am inclined to think it so. First, it is important to keep in mind that the kind of fault identified by the law of qualified immunity does not define the intrinsic content of constitutional rights, nor does it limit the usual mechanisms of their enforcement. The negligence-type inquiry derives not from the law of constitutional rights, but from the law of constitutional torts — that is, from the use of compensatory damages to vindicate constitutional violations. This remedy is a modern addition to the constitutional scheme. As originally conceived, most constitutional rights were not standards of compensatory liability. They were prohibitions of government misconduct and could be invoked defensively to resist government power. The creation of private causes of action for compensatory damages added a new and important mechanism of enforcement to the existing constitutional scheme. That this additional remedy should have its own structure and limitations is hardly surprising. Recognizing the negligence-type inquiry as central to the law of constitutional torts does not imply a redefinition of the rights themselves nor any limitation of their traditional application.

Second, the belief that fault of the sort ordinarily relevant in compensatory judgments is intrinsic in all constitutional violations seems to me more responsive to the traditional rhetoric of constitutional law than to much of its current doctrine. Traditionally, constitutional rights are described as fundamental and timeless. In fact, some are neither. The Supreme Court recognizes this most pointedly in the doctrine of nonretroactivity. These cases involve constitutional rights that are admittedly new and the absence of which is sufficiently tolerable that the rulings are made to apply only prospectively.[62] Similar characteristics are found in many constitutional decisions that are not singled out for nonretroactivity. *Owen* itself is a good example. The municipality's error in that case was the failure to provide a lawfully

62. *See, e.g.*, Michigan v. Payne, 412 U.S. 47 (1973) (refusing retroactive application of limitations on increased sentences after appeal announced in North Carolina v. Pearce, 395 U.S. 711 (1969)); Desist v. United States, 394 U.S. 244 (1969) (refusing retroactive application of the ruling in Katz v. United States, 389 U.S. 347 (1967), that electronic interception is a search); DeStefano v. Woods, 392 U.S. 631 (1968) (refusing retroactive application of Bloom v. Illinois, 391 U.S. 194 (1968), extending the right to trial by jury); Stovall v. Denno, 388 U.S. 293 (1967) (refusing retroactive application of the requirement of counsel at pre-trial line-ups announced in United States v. Wade, 388 U.S. 218 (1967)); Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966) (refusing retroactive application of the rule of Griffin v. California, 380 U.S. 609 (1965), forbidding prosecutorial comment on a defendant's failure to testify); Linkletter v. Walker, 381 U.S. 618 (1965) (refusing retroactive application of the exclusionary rule of Mapp v. Ohio, 367 U.S. 643 (1961)).

discharged police chief with a "name-clearing hearing" — that is, a governmentally sponsored, nondecisional opportunity for the police chief to rebut certain accusations damaging to his reputation. Such proceedings had not been required at the time the police chief was fired.[63] In these circumstances, it is surely odd to describe the municipality's action as intrinsically wrongful. In this and other cases,[64] the only apparent fault is a failure of prescience.

It is precisely in such circumstances that the role of fault must be judged. The importance of a negligence-type inquiry is not revealed in the cases where it would be readily satisfied. Rather, one must look at situations where a requirement of fault would be decisive. If, as I believe to be true, there are cases in which unconstitutional actions cannot be considered blameworthy, then it follows that fault is not inherent in all violations of constitutional rights. In some cases, an independent inquiry into the unreasonableness of the government's conduct will be required in order to find wrongdoing. Absent such a finding, there is no wrong to right, and the rationale of corrective justice does not apply. Whatever instrumental arguments might be made for strict liability (arguments not considered here), there is, in my opinion, no noninstrumental basis for compensatory liability without proof of fault.

IV. IMPLICATIONS

The centrality of fault to the idea of corrective justice has important implications for the law of section 1983. "Implications" is used advisedly, for even if these views are correct, they do not lead inexorably to specific conclusions. For one thing, there has been no discussion of incentive effects. Such concerns are surely relevant and perhaps controlling. No analysis that avoids them can possibly be complete. But that incompleteness does not negate the value of clarifying our understanding of the nondeterrence perspective. It is not necessary to solve all of a problem in order to say something useful about a part.[65] The question here is what sort of noninstrumental con-

63. *See* Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

64. *Cf.* Pembaur v. City of Cincinnati, 475 U.S. 469 (1986), where the constitutional violation consisted of an action correctly described by Justice White as "not then illegal under federal, state, or local law." 475 U.S. at 485 (White, J., concurring). The action was recognized as unconstitutional only after the subsequent decision of Steagald v. United States, 451 U.S. 204 (1981).

65. For a related inquiry into another part of the problem of damages actions for constitutional violations, see Jeffries, *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461 (1989).

cerns should intrude on the analysis of incentive effect. In those terms, the focus on corrective justice has both specific and general implications for the law of section 1983.

The specific implication is that *Owen* is wrong — at least on its stated rationale. The Court's desire to avoid "injustice" (which I take to be a noninstrumental concern) does not support the abrogation of qualified immunity. "Elemental notions of fairness" in fact do *not* "dictate that one who causes a loss should bear the loss." If that were true, compensation would be required for an enormous range of nonactionable losses caused by government. The notion that government should compensate citizens for the "costs" of living in an organized society is a breathtaking departure from existing social arrangements and one not indicated by any accepted understanding of "fairness" or "justice."

The "elemental notion of fairness" to which the Court should have made reference is Aristotelian corrective justice: one who *wrongfully* causes a loss should make good that loss. This idea is descriptively familiar and morally persuasive, but it does not support a universal desideratum of "compensation" for all losses caused by unconstitutional actions. It supports wealth transfers without regard to distributive effect only where there is fault. Therefore, unless deterrence concerns dictate otherwise (an issue not considered here), the *Owen* Court's withdrawal of qualified immunity from local governments seems misguided.

The same point can be made more generally. Outside the context of *Owen,* the Court has often noted the "injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion."[66] This emphasis on fault is entirely consistent with the argument from corrective justice. It rightly identifies the defendant's state of mind, not as some extraneous intrusion into the workings of a compensatory regime, but as an essential feature of the normative basis for imposing liability in the first place. Occasionally, however, the vagrant attitude of *Owen* slips in. Occasionally, official immunity is treated as if it were subversive of the appropriate reach of a compensatory regime.[67] Thus, immunity claims sometimes evoke a hostility born of the suspicion that any limitation on damages liability for un-

66. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974); *see also* Butz v. Economou, 438 U.S. 478 (1978).

67. *See, e.g.,* Anderson v. Creighton, 483 U.S. 635, 647-48 (1987) (Stevens, J., dissenting); Wells, *The Past and Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules,* 19 CONN. L. REV. 53, 78-81 (1986).

constitutional acts is in principle undesirable. This intuition is error. Investigation into the defendant's fault is entirely appropriate. At least in the absence of an argument based on incentive effects, the inquiry into fault is essential to the case for awarding money damages for constitutional violations. Properly understood, the value of "compensation" is not to the contrary.